

**U.S. Department of Labor**

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**Issue Date: 10 December 2003**

**CASE NOS.: 2003-LHC-647**

**OWCP NOS.: 07-157858**

**IN THE MATTER OF**

**DAVID R. VERSIGA,  
Claimant**

**v.**

**FRIEDE GOLDMAN OFFSHORE,  
Employer**

**and**

**RELIANCE INSURANCE COMPANY,  
Carrier**

**APPEARANCES:**

**TOMMY DULIN, ESQ.  
On behalf of the Claimant**

**MICHAEL J. McELHANEY, JR., ESQ.  
On behalf of the Employer**

**Before: LARRY W. PRICE  
Administrative Law Judge**

**DECISION AND ORDER DENYING BENEFITS**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by David R. Versiga (Claimant) against Freide Goldman Offshore (Employer) and Reliance Insurance Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Gulfport, Mississippi, on September 16, 2003. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Claimant's Exhibits 1-36; and
2. Employer's Exhibits 1-29.

The record was left open post-hearing in order for the Parties to obtain two depositions. The depositions of Ricky Parker and Dr. Victor Bazzone were submitted as Employer's Exhibits 31 and 32<sup>1</sup> on October 2, 2003. The record was closed on October 16, 2003. On October 20, 2003, Claimant submitted a motion to reconsider the Court's previous order granting a motion for partial summary decision and dismissing Ingalls/Northrop Grumman Ship Systems from the case. The Court denied this motion on October 27, 2003, reserving its ruling on Claimant's alternate motion to strike the post-hearing deposition of Dr. Bazzone. Claimant had argued at the hearing that allowing Dr. Bazzone, Employer's choice of physician, to testify post-hearing could result in prejudice to Claimant. Relying on the well-known principle that an administrative law judge has great discretion concerning the admission of evidence,<sup>2</sup> I find that the post-hearing deposition of Dr. Bazzone is admissible. Employer's Exhibits 31 and 32 are hereby admitted into evidence.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

## **I. STIPULATIONS**

During the course of the hearing the parties stipulated and I find as related to Case No. 2003-LHC-647:

1. Jurisdiction is not a contested issue.
2. Date of injury/accident (laceration to the face): November 10, 1999.
3. Employer/Employee relationship at time of accident: Yes.

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<sup>1</sup> I note that although Employer's exhibit list, submitted with the exhibits at the hearing, contains thirty listed exhibits, there were only twenty-nine exhibits submitted by Employer and admitted at the hearing.

<sup>2</sup> See *Cooper v. Offshore Pipelines Int'l, Inc., et al*, 33 BRBS 46, 51 (Apr. 28, 1999). Judges hearing cases under the Act are not bound by the Federal Rules of Evidence and may admit relevant evidence which might not otherwise be admissible under the Rules. See 29 C.F.R. § 18.001(b)(2).

4. Date Employer was advised of injury: November 10, 1999.
5. Compensation has been paid as follows for an unrelated finger injury:
  - a. Temporary total disability: from November 15, 1999, through March 30, 2000; total paid: \$3,330.94.
  - b. Section 8(i) settlement payment: \$2,500.
6. No compensation has been paid for the injury at issue.

## **II. ISSUES**

The unresolved issues in this proceeding are:

1. Causation.
2. Nature and extent.
3. Average weekly wage.
4. Medical benefits.
5. Interest, penalties and attorney's fees.

## **III. STATEMENT OF THE CASE**

### **Claimant's Testimony**

Claimant is a forty-two year old man who resides in Pascagoula, Mississippi. (Tr. 22). He attended school through the twelfth grade and obtained a GED in 1986. Claimant has also taken junior college classes in a variety of subject areas, including marketing and drafting. His work experience consists of jobs as a shipyard laborer, a private investigator and a nightclub bouncer. (Tr. 23). He has never been convicted of a felony. (Tr. 40-41). Claimant is a custom knife-maker and an avid cyclist. (Tr. 24).

Claimant has had previous workers' compensation claims with other employers. (Tr. 26-27). He injured his neck in December 1991 while working for Ingalls Shipbuilding as a chipper. He also injured his knee while working for Pinkerton Security, and he received lost wages from a head injury sustained while working at a nightclub in 1996. (Tr. 27, 46).

Claimant testified that the effects of his 1991 workplace injury lasted for about five years, but in about 1996 or 1997, his condition began to improve such that he was

able to return to work and start cycling again. (Tr. 29). Claimant explained that after 1996, he no longer had constant pain, but he did experience pain every now and then. (Tr. 49-50).

Claimant began working for Employer in October 1998. Claimant affirmed that he passed a pre-employment physical before he went to work for Employer. (Tr. 25). Claimant was a welder helper and also worked briefly as a machinist. (Tr. 24-25). His duties included cleaning, grinding welds and working with welders. He worked from 6:30 a.m. to 5:00 p.m. five to six days per week. (Tr. 31). Claimant's initial wage was \$8.50 per hour, but he later received a raise to \$9.00 per hour. (Tr. 26). Claimant testified that he never received any warnings or any form of on-the-job discipline in his tenure with Employer, although he did receive a verbal reprimand once for not wearing his safety shield and was also terminated at one point for missing work while in the hospital for an unrelated accident. (Tr. 26, 45). Claimant acknowledged that Employer's policy is that a worker who does not call in and bring a medical excuse for missing work will be terminated. (Tr. 45-46). Claimant last worked for Employer on December 20, 1999. (Tr. 26). Claimant affirmed that he worked about fourteen weeks before his injury. (Tr. 44). In 1998 and 1999 combined, Claimant only earned a little more than \$5,000 working for Employer. (Tr. 53).

On November 10, 1999, Claimant was working on top of a scaffold very early in the morning when his safety glasses began to fog up. (Tr. 32). As Claimant took a step toward his tools, he ran into a hanger and struck the left side of his face. His face started bleeding, and a medic sealed the cut with Dermabond. (Tr. 33). Claimant returned to work that same day, as well as the following day. He testified that his neck was somewhat sore, but after four to five days, the pain subsided. (Tr. 34).

On November 12, 1999, Claimant sustained a workplace injury to his finger when a sliver of metal became stuck in his finger, causing his hand and arm to swell. (Tr. 27). After that injury, Claimant returned to work on December 20, 1999, but he returned to the doctor after several hours of work because his hand was still swollen. (Tr. 34). In January 2000, Claimant learned that he had been terminated for not calling in during his periods of absence. (Tr. 34-35). He later received a settlement from Employer for that injury. (Tr. 27-28).

According to Claimant, he did not injure his neck at any time between November 10, 1999, and the time that he began seeking treatment for neck pain several months later. (Tr. 30). Claimant testified that during that time, he experienced flare-ups in neck pain in January and March 2000. (Tr. 35). Claimant denied doing any activities to exacerbate the neck pain, but he acknowledged that he did help his father work on a house and he rode his bike quite often until May 2000, when his neck pain began to persist. (Tr. 35-36). Claimant's symptoms were similar to those that he had experienced after his 1991 injury, but the pain was on the right side of his body rather than the left. (Tr. 36).

In terms of Claimant's treatment for the cervical injury at issue, he went to the emergency room in July 2000 and then saw Dr. John McCloskey about a month later, on August 9, 2000. (Tr. 29-30, 36). Claimant told Dr. McCloskey that he believed his neck injury was caused by the workplace accident in November 1999, and Dr. McCloskey agreed. (Tr. 36-37). Dr. McCloskey ordered an MRI, which was done in September 2000, and a myelogram, which was done in December 2000. Dr. McCloskey referred Claimant to Dr. Robert Fortier-Bensen, a pain specialist. (Tr. 30). Dr. Bensen treated Claimant for his neck and his lower back. (Tr. 30-31).

Claimant requested Carrier's authorization for treatment of his neck injury, but Carrier denied approval of the treatment. According to Claimant, Dr. McCloskey has not been paid. Claimant's father paid for Dr. Bensen's treatment. (Tr. 37). On August 13, 2003, Claimant saw Dr. Victor Bazzone for an independent medical examination at Employer's behest. (Tr. 37-38). Claimant was aware that Dr. Bazzone recommended surgery at the C5-6 level, and he was amenable to undergoing that procedure. (Tr. 39-40).

Claimant describes his current pain as an ache in the base of his neck radiating to his right shoulder and arm. (Tr. 38-39). The pain is intermittent. Claimant testified that his pain increases with an increase in activity. He takes pain medication as prescribed by Dr. Bensen. (Tr. 39). Claimant, who owns a \$4,100 bicycle, began riding often with a friend during February 2000, but he always stopped when the riding caused him pain. Claimant never told Dr. McCloskey about his bike rides because he did not think this activity had anything to do with his injury. (Tr. 47).

In the time since his November 1999 injury, Claimant was involved in an altercation with his brother. He denied injuring his cervical area during the fight and explained that afterward, his pain continued to radiate into his arm and his hand, just as it had done before the altercation. (Tr. 41). Claimant testified that video surveillance showed him cutting some wall insulation and helping his father to fit it into the wall. He estimated that he worked with his father for only about thirty minutes that day. Claimant denied injuring his neck while doing this job. (Tr. 40).

At this time, Claimant does not feel physically capable of working. (Tr. 55).

### **Claimant's July 21, 2003 Affidavit**

According to this sworn affidavit, which released Ingalls Shipbuilding from any liability for Claimant's current complaints of neck, right shoulder and right arm pain, Claimant's symptoms and pain gradually began to improve to almost pain-free during 1994 and 1998. (CX. 28, p. 2).

## **Testimony of Christopher Pennington**

Mr. Pennington testified as an expert witness in the field of vocational rehabilitation. (Tr. 57). Along with Leon Tingle, another rehabilitation counselor, he wrote Claimant's vocational reports. (Tr. 58). Mr. Pennington affirmed that since preparing his report, he had read the reports of Dr. Fortier-Bensen and Dr. McCloskey, and these findings did not change his opinion as regards the original report. Mr. Pennington affirmed that Claimant told Mr. Tingle during the evaluation that he did not feel capable of engaging in sustained work activity. (Tr. 59). He agreed that Claimant's low back injury might contribute to Claimant's inability to work. (Tr. 60). Mr. Pennington did not know the specific implications of the fact that Claimant takes Demerol. All the potential jobs identified for Claimant were less physically demanding than shipyard work. (Tr. 61). Mr. Pennington did not provide Claimant with a copy of his reports. (Tr. 62).

## **Deposition of Darren Versiga**

Mr. Versiga is Claimant's brother. He is aware that Claimant had "some problems" while working for Employer but did not know the details of Claimant's November 1999 workplace accident. (RX. 15, p. 4). Mr. Versiga also did not know the details of Claimant's 1991 workplace accident at Ingalls. (RX. 15, p. 5). After Mr. Versiga was noticed for the deposition, Claimant explained to him what had happened in his November 1999 workplace accident. Mr. Versiga testified that Claimant told him that he had slipped and hit his head on something and had been having problems ever since. (RX. 15, p. 6).

Mr. Versiga testified that in the last fifteen years, Claimant has sustained injuries to his back, foot thumb, finger and head. (RX. 15, p. 29). He knew that Claimant had broken his arm and thought that Claimant had broken his ankle. (RX. 15, pp. 29-30). He did not remember whether Claimant has ever broken his leg. He thought that Claimant had undergone back surgery and agreed that Claimant has had a variety of injuries over the years. (RX. 15, p. 30). Mr. Versiga did not know much about Claimant's neck problems but testified that Claimant has been in and out of the hospital numerous times for various complaints. (RX. 15, p. 8). Claimant has complained about neck and back pain to Mr. Versiga. (RX. 15, pp. 12-13). Mr. Versiga believes that Claimant is a hypochondriac. (RX. 15, p. 8).

Mr. Versiga testified that Claimant's primary physical exercise has been through his long-distance bike riding. (RX. 15, pp. 16-16). He did not remember the last time that he saw Claimant riding a bike but believed it was some time before 2001. (RX. 15, p. 10). When Mr. Versiga saw Claimant at Christmas in 2000, he did not recall Claimant acting hurt or complaining about any pain. (RX. 15, p. 27).

Mr. Versiga did not know when Claimant last had a job. (RX. 15, p. 17). He did not remember Claimant doing any work during 2000 or 2001. (RX. 15, p. 23). Mr. Versiga testified that he does not believe Claimant has ever made any money from his knife-making hobby because he gives the knives away rather than selling them. (RX. 15, pp. 30-31). He does not know why Claimant does not make knives anymore. (RX. 15, p. 31). Although their father told Mr. Versiga that Claimant had helped him around the house, Mr. Versiga never observed Claimant doing any work around the house with their father. (RX. 15, pp. 17-18). Mr. Versiga did not know much about Claimant's financial situation but assumed that his parents would probably help Claimant out if he needed some money. (RX. 15, p. 21).

Mr. Versiga testified that he believes that one of Claimant's friends is addicted to narcotic pain medication. (RX. 15, pp. 19-20). In Mr. Versiga's opinion, Claimant was addicted to narcotics at one point, but he does not know whether Claimant was addicted to narcotics at the time of the deposition. (RX. 15, p. 34).

### **Deposition of Steve Wood**

Mr. Wood was deposed on August 28, 2003. Mr. Wood has known Claimant for over ten years. (CX. 33, p. 6). He affirmed that Claimant was a competitive bike racer in the late 1980s. (CX. 33, p. 25). Mr. Wood estimated that Claimant probably rode about thirty-five to fifty miles a day when training for competition. Claimant no longer rides this type of distance. (CX. 33, p. 26). Mr. Wood and Claimant have ridden bikes together on the beach, usually averaging seventeen to twenty miles an hour. (CX. 33, pp. 9-10). Mr. Wood testified that cycling can be dangerous, particularly in the event of a fall or a wreck. When cycling, a person can get jostled around. (CX. 33, p. 20). Mr. Wood last rode bikes with Claimant a few months before his deposition. They rode about ten miles. (CX. 33, p. 10). Mr. Wood did not recall Claimant complaining about any specific physical problems at that time, but he noted that Claimant frequently complained about various aches and pains, such as back, arm and neck pain. (CX. 33, pp. 11, 16-17).

Mr. Wood affirmed that he, Claimant and another friend went on a forty-mile ride in April 2000. (CX. 33, p. 14). Mr. Wood did not ride with Claimant in the summer of 2000, nor did Claimant and Mr. Wood ride together very often in 2001-2002. (CX. 33, pp. 12-13). For the past few years, Mr. Wood has invited Claimant to go on 200-mile group bike rides, but Claimant has declined. (CX. 33, p. 27).

Mr. Wood was aware that Claimant had been injured while working for Employer, but he did not know any of the specifics of that injury other than the fact that Claimant had walked into "some angle iron or something." (CX. 33, pp. 17-18). On one occasion in late 2000, Claimant told Mr. Wood about his accident and said that sometimes his hand and arm were numb and that he had neck and back pain. (CX. 33, p. 18). Mr.

Wood testified that he thought Claimant's difficulties were in his right arm and hand. (CX. 33, p. 26).

Mr. Wood did not know much about Claimant's employment/financial situation, although he did know that Claimant does not work. (CX. 33, p. 19). He did not know whether Claimant has sustained any new injuries in the time since his workplace injury, but he was aware of Claimant's involvement in an altercation. (CX. 33, p. 21). Mr. Wood testified that Claimant and his brother have had some problems getting along. He thought that these problems were related to Claimant's injuries. (CX. 33, p. 29).

Mr. Wood spoke with Claimant about his deposition the night before he testified. (CX. 33, pp. 22-23). Claimant told Mr. Wood that he hoped to get a settlement and that he was concerned about his finances because his father had recently passed away. (CX. 33, p. 24).

### **Deposition of Ricky Parker**

Mr. Parker is self-employed as a safety consultant. (RX. 31, p. 4). In November 1999, he worked for Employer as the director of corporate safety. (RX. 31, p. 5). Mr. Parker does not know Claimant and had no knowledge of Claimant's workplace injuries other than what he learned through his review of Claimant's personnel file and medical file. (RX. 31, pp. 21-22). He testified that company policy requires that when an employee is injured on the job, he must call in every day unless he is on approved medical leave. When the employee returns to work, he must bring a medical excuse. (RX. 31, p. 6). He affirmed that a December 28, 1999 change of status form indicated that Claimant was terminated and then reinstated on medical leave. (RX. 31, pp. 7-8).

Mr. Parker testified that employees are supposed to report all on-the-job injuries, no matter how slight. He agreed that if Claimant had hurt his neck, it was policy to report that injury. (RX. 31, p. 9). Mr. Parker testified that not reporting an injury is grounds for termination. (RX. 31, pp. 10-11). Reporting an injury several months after the fact is a violation of company rules and could result in termination. (RX. 31, p. 20). Mr. Parker affirmed that Claimant was out from work for many months with his unrelated finger injury, so he was not present to discuss his neck problems with anyone at the shipyard. (RX. 31, p. 23). Mr. Parker did not know, however, why Claimant did not report his neck injury, which allegedly occurred on November 10, 1999, on November 11, the day before he sustained the November 12, 1999 finger injury. (RX. 31, p. 28).

In his experience, Mr. Parker has known of other shipyard workers who have injured their necks by striking their heads on hangers. (RX. 31, pp. 22-23). He has also known individuals who waited for several days after an accident before complaining of a back injury. (RX. 31, p. 23).

At the time of Claimant's injury, Employer had a light duty work program. (RX. 31, p. 12). Claimant would have been placed in this program after he was released to work and would have been paid the same salary that he earned before his injury. (RX. 31, pp. 12-13). Mr. Parker affirmed that during the time frame when Claimant was released to work, Employer did not offer overtime hours to its light duty employees. (RX. 31, p. 26).

In placing Claimant in a light duty position, Employer would first try to find work in Claimant's original craft department within his restrictions. (RX. 31, pp. 14-15). The light duty jobs in Claimant's particular department might include positions in fire watch or smoke watch. (RX. 31, pp. 15-17). This job might require an employee to lift a twenty-pound fire extinguisher or two to three pounds of welding rods. (RX. 31, pp. 16-17). In the electrical shop, light duty work might include positions putting things together in the electrical shop. In this job, there is no lifting over ten to fifteen pounds. Mr. Parker pointed out that assuming that Claimant had a right hand restriction, he would have difficulty with certain tasks, such as cleaning electrical equipment. (RX. 31, p. 18).

Mr. Parker testified that often light duty employees are assigned to work in the guard shack, signing people in and out. This job does not require lifting any weight. There is also light duty work available passing out tools in the tool room. (RX. 31, p. 19).

Mr. Parker believed that Employer continues to have a light duty program at the present time. He testified that some other shipbuilding companies are hiring at this time. One company was hiring fitters and welders, but he did not know whether any light duty work was available with that company. (RX. 31, p. 20). Mr. Parker was unsure for which crafts another company was hiring. (RX. 31, p. 21).

## **Medical Evidence**

### *Deposition of John J. McCloskey, M.D.*

Dr. McCloskey is a neurosurgeon who has treated Claimant. (CX. 34, pp. 4, 6). On September 4, 1992, Dr. McCloskey performed surgery to repair a ruptured disc at C6-7 on the left side of Claimant's neck. (CX. 34, pp. 6, 11). On March 10, 1993, Claimant reached maximum medical improvement (MMI) with a ten percent whole body permanent partial disability rating. Dr. McCloskey did not feel that Claimant was able to return to his pre-injury employment as a chipper. (CX. 34, p. 7). His permanent restrictions, which included no climbing, no overhead work and no lifting over thirty pounds, have never been modified or changed, although Dr. McCloskey did release Claimant to regular duty as a sheet metal apprentice on September 11, 1998. (CX. 34, pp. 7-8).

During the time after Claimant reached MMI, he suffered numerous aggravations to his neck. (CX. 34, p. 49). Claimant's neck pain was aggravated, *inter alia*, by his climbing on the job with Employer. (CX. 34, pp. 49-50). Between 1996 and 1999, Dr. McCloskey continued to treat Claimant for neck pain, which had been ongoing since his 1991 injury. (CX. 34, p. 33). He acknowledged, however, that if Claimant was regularly riding bicycles for long distances during this time period, his neck must have been doing pretty well, since riding a bike typically requires a person to hyperextend the neck. (CX. 34, p. 80). According to Dr. McCloskey, Claimant was admitted to the hospital for pain management many times. (CX. 34, pp. 36-37). Dr. McCloskey testified that he has treated Claimant for objective problems but that most of the treatment he has provided to Claimant has been for subjective complaints of pain. (CX. 34, p. 63).

When Dr. McCloskey saw Claimant on August 9, 2000, Claimant reported neck and right arm pain and told Dr. McCloskey that the pain began while he was working for Employer in November 1999. (CX. 34, p. 10). Dr. McCloskey affirmed that the type of accident described by Claimant is a plausible means of causing a neck injury, particularly in someone who already has a bad neck. (CX. 34, pp. 50, 67). He did not think it was unusual that Claimant did not mention an increase in neck pain at the time of the accident, both because Claimant was bleeding from the face after striking the hanger and because sometimes neck pain does not manifest itself immediately upon injury. (CX. 34, pp. 51, 58).

Claimant told Dr. McCloskey that his current neck pain had begun about two months before the appointment. Dr. McCloskey's impression was new onset cervical radiculopathy with right arm pain. He noted that Claimant also suffered from chronic low back problems and a hiatal hernia. (CX. 34, p. 11). Based on the history given by Claimant, Dr. McCloskey concluded that Claimant's current problems were due to a new injury and were unrelated to the 1991 injury. (CX. 34, p. 12). Dr. McCloskey affirmed that Claimant's July 9, 2000 emergency room visit records indicated that he had not done anything to re-injure his neck. (CX. 24, pp. 17-18).

A September 21, 2000 MRI report indicated that Claimant had a disc bulge at C5-6 producing mild stenosis. (CX. 34, p. 19). Dr. McCloskey agreed that a 1998 MRI of Claimant's cervical spine had shown essentially the same findings, as it indicated that Claimant had mild bulging to the right at C5-6 without actual herniation. (CX. 34, p. 20). Dr. McCloskey ordered a myelogram and some electrical studies. (CX. 34, pp. 67-68). The EMG nerve conduction study indicated carpal tunnel on the right, which explained the tingling in Claimant's right hand. There were no nerve root defects or surgical indications. (CX. 34, p. 68).

Dr. McCloskey last saw Claimant on November 16, 2000. (CX. 34, pp. 39-40). Dr. McCloskey affirmed that Claimant's condition as of their last appointment was due to the aggravation of his 1991 injury by later traumatic events, including Claimant's work with Employer. (CX. 34, pp. 55, 60). Dr. McCloskey later clarified by acknowledging

that while the medical records indicated that Claimant had aggravated his low back condition while climbing on the job for Employer, there was no indication that the climbing had aggravated Claimant's neck condition. (CX. 34, p. 75).

In Dr. McCloskey's medical opinion, based upon a reasonable degree of medical probability, it would be difficult "to make a tight correlation between the injury and the complaint" based on the history given by Claimant. (CX. 34, p. 40). Dr. McCloskey noted that Claimant had significant pre-existing back and neck problems. (CX. 34, pp. 40-41). In his opinion, there was nothing solid to connect Claimant's neck problems in August 2000 to a November 1999 injury, as the medical records did not strongly support Claimant's own version of the history of the injury. (CX. 34, p. 42). He thought it was possible that Claimant's November 1999 accident only produced a temporary aggravation because he did not have the evidence to determine whether it produced a permanent aggravation. (CX. 34, p. 82).

Dr. McCloskey did not know whether Claimant was able to work at the present time. (CX. 34, p. 61). He noted that a video surveillance tape taken in May 2000 showed "a different man than I saw in the office." (CX. 34, pp. 61, 64). He agreed, however, that the tape did not show Claimant lifting or carrying any heavy objects. (CX. 34, p. 64). Based on the objective evidence, Dr. McCloskey believed that Claimant's original permanent restrictions were still applicable. (CX. 34, p. 61).

*Deposition of Robert Fortier-Bensen, M.D.*

Dr. Bensen specializes in pain management. (CX. 35, p. 5). He first saw Claimant on June 6, 2001. At that time, Claimant complained of pain in his neck, right arm, low back, left knee, right ankle, left arm and teeth. (CX. 35, p. 6). Claimant related the history of his various accidents and injuries over the years. (CX. 35, pp. 6-7). Claimant told Dr. Bensen that he had suffered from neck pain from 1991 until 1997 and then began having problems again in 1999. (CX. 35, pp. 9-10). Dr. Bensen did not know much about Claimant's November 1999 workplace injury. (CX. 35, p. 18). Dr. Bensen affirmed that Claimant requested Demerol for pain relief but stated that it is not unusual for patients to request one kind of medication over another. (CX. 35, pp. 16-17).

On July 2, 2001, Claimant reported chronic pain. (CX. 35, p. 17). Dr. Bensen sent Claimant to physical therapy on July 9, in preparation for a trial of diagnostic injections to help with Claimant's lumbar spine problems. (CX. 35, pp. 17-18). Ruth Bosarge, the physical therapist, pinpointed the problem areas, after which Dr. Bensen gave Claimant some facet injections in the back for diagnostic and therapeutic purposes. (CX. 35, pp. 19-20). On August 1, Claimant reported that the injections had helped somewhat but he still had pain in the right shoulder, lumbar area and the left side. (CX. 35, p. 21). He requested a change in pain medication dosage and another set of injections. (CX. 35, pp. 21-22). On August 27, Claimant reported improvement from the injections but made no mention of neck pain. (CX. 35, pp. 23-24). Dr. Bensen noted that

often people experience neck pain as a result of a low back problem. (CX. 35, pp. 24-25).

When Claimant returned to Dr. Bensen on September 24 and October 26, 2001, his pain had returned. (CX. 35, pp. 25-27). Dr. Bensen began to suspect that Claimant had a disc problem in his lower back. (CX. 35, pp. 27, 30). Dr. Bensen continued to treat Claimant's lower back throughout the remainder of 2001, 2002 and into 2003, during which time there was no significant change in Claimant's condition. (CX. 35, pp. 28-31, 33, 40-46, 49, 51-53). Claimant's pain drawings typically focused on his lower back pain and did not indicate neck pain. (CX. 35, pp. 43-46).

Dr. Bensen conducted an on-going pain assessment in December 2002. The results indicated that Claimant's pain tended to worsen in the evening and that Claimant had good days and bad days with respect to pain. With increased activity, Claimant's pain increased. (CX. 35, p. 47). Based on these results, Dr. Bensen felt that Claimant might benefit from an increase in pain medication. (CX. 35, pp. 48-49). He affirmed that Claimant's use of Demerol has increased as Claimant has become more tolerant to the medication. (CX. 35, pp. 66-67). Dr. Bensen testified that Claimant has never had a problem with his medication and has always taken it as prescribed. (CX. 35, p. 69). Dr. Bensen never had cause to believe that Claimant was exaggerating his complaints. (CX. 35, p. 84).

Claimant's condition essentially has been unchanged throughout 2003. (CX. 35, pp. 46, 49, 51-53). Dr. Bensen affirmed that Claimant's condition has remained stable throughout his treatment, with some temporary improvements but no resolution to his problems. (CX. 35, p. 64). Dr. Bensen agreed that Claimant's condition has been stable since a 2000 FCE and that Claimant is probably capable of doing at least light duty, if not medium duty, work. (CX. 34, pp. 62, 64-65). He agreed that Claimant would likely be capable of doing even more activity if he did not have a back problem, as the back has been the primary problem for which Dr. Bensen has treated Claimant. (CX. 34, p. 65).

On August 18, 2003, Dr. Bensen opined that Claimant was temporarily totally disabled based on his lower back condition. (CX. 35, pp. 54, 56). Although Dr. Bensen had treated Claimant's neck on occasion, most of his treatment focused on the lower back. (CX. 35, p. 56). Due to Claimant's financial situation, Dr. Bensen has been unable to confirm whether Claimant has a disc problem, but he would like to order a discogram to evaluate Claimant's L5-S1 disc. (CX. 35, pp. 57, 74). Dr. Bensen cannot place Claimant at MMI until he can discover the true cause of Claimant's pain. (CX. 35, pp. 63-64).

Based on the history provided by Claimant to Dr. Bensen and to Dr. McCloskey, Dr. Bensen agreed that Claimant's neck problems were likely related to his 1991 and 1999 workplace injuries but that Claimant's chronic back pain was not a result of these injuries. (CX. 35, pp. 61-62). Since Dr. Bensen did not treat Claimant's neck problems,

he deferred to Dr. McCloskey's opinion as to the neck condition and its cause. (CX. 35, pp. 79, 81, 91-92).

Dr. Bensen believed that Claimant, vis-à-vis his father, has paid all medical bills associated with his treatment, which probably total several thousand dollars. (CX. 35, pp. 97-98, 101).

*Deposition of Victor T. Bazzone, M.D.*

Dr. Bazzone is a neurosurgeon who performed an employer's medical examination (EME) on Claimant on August 13, 2003. (RX. 32, pp. 4-5). At that time, Dr. Bazzone had no medical records and relied solely on the history provided by Claimant. Dr. Bazzone has since obtained Claimant's medical records. (RX. 32, p. 5). During the EME, Claimant related to Dr. Bazzone that he had been having problems with his neck ever since a November 1999 workplace accident in which he struck the left side of his face on a hanger. Claimant told Dr. Bazzone that he began having unrelenting neck pain and right upper extremity pain in May 2000, for which he had seen Dr. McCloskey. (RX. 32, p. 6). Claimant told Dr. Bazzone that he also saw Dr. Bensen for pain management but had not obtained lasting relief. (RX. 32, p. 7).

When Dr. Bazzone saw Claimant, Claimant had pain in the neck and right upper extremity, as well as weakness in the right upper extremity and decreased sensation in the top of the right hand. (RX. 32, p. 6). Claimant related these symptoms back to the November 1999 injury. (RX. 32, pp. 6-7). Upon examination, Dr. Bazzone noted no objective findings. (RX. 32, pp. 18-19). After examining Claimant and reviewing his X-rays, Dr. Bazzone concluded that all treatment options had failed to alleviate his pain. (RX. 32, p. 9). He recommended that Claimant undergo an anterior cervical discectomy and fusion at C5-6 after first undergoing repeat radiologic studies. (RX. 32, pp. 9-10).

Dr. Bazzone noted that Claimant had a history of neck problems since 1991 and was treated for these problems from 1991 through 1999, when he had the workplace accident in question. Although Claimant claimed to be symptom-free from 1996 until 1999, Dr. Bazzone observed that the medical records did not support this claim. (RX. 32, p. 12). According to Dr. Bazzone, it was irrelevant whether Claimant sought less treatment between 1996 and 1999 than he had before 1996, "because cervical spondylosis is fraught with ups and downs." (RX. 32, p. 24). Dr. Bazzone opined that the November 1999 accident produced a temporary aggravation of approximately one week and that the neck problems that Claimant reported in May or June of 2000 were a progression of an underlying condition. (RX. 32, pp. 14, 25-26). Dr. Bazzone did not believe that the blow that Claimant suffered to his face in November 1999 accelerated his pre-existing condition. (RX. 32, p. 40).

Although Dr. Bazzone did not have any objective indications that Claimant sustained another cervical injury subsequent to the November 1999 injury, he explained that cervical spondylosis can be exacerbated even without suffering a subsequent injury. (RX. 32, p. 26). Dr. Bazzone does not believe that Claimant suffers from a herniated disc. (RX. 32, p. 32). Claimant's disc bulge at C5-6 is a result of osteophytic bridging, not a ruptured disc. (RX. 32, p. 33).

When asked whether Claimant's lengthy bike rides could be the cause of his neck problems, Dr. Bazzone testified that bike riding usually involves extension or hyperextension of the neck, which in turn forms osteophytes in the neck. (RX. 34, pp. 15-16). When asked his observations of the May 2000 video surveillance tape of Claimant, Dr. Bazzone commented that Claimant may not have been having any problems that day, which is typical of cervical spondylosis. (RX. 32, p. 16). He emphasized that Claimant's neck condition is a long-term problem, and he will continue to have problems until he does something about it. (RX. 32, pp. 16-17). Even with surgery, Claimant should not anticipate total relief, based on his past medical history. (RX. 32, p. 19).

*Medical Records of Daniel Enger, M.D.*

In 1992, Dr. Enger treated Claimant for lumbar and cervical pain. (CX. 25). Despite Claimant's complaints of cervical pain, a May 1992 MRI of the cervical spine was normal other than showing a very small central-type disc at C5-6. (CX. 25, pp. 2, 4). At the time, Claimant was not working, and Dr. Enger commented that based on his past treatment of Claimant and his knowledge of Claimant's medical history, he believed it would be difficult to return Claimant to gainful employment. (CX. 25, p. 4).

*Medical Records of Richard Buckley, M.D.*

On December 17, 1992, Dr. Buckley saw Claimant for continued complaints of neck pain on a referral from Dr. McCloskey. Claimant had undergone a cervical discectomy in September 1992 and still had not returned to work. Claimant reported that his pain never dissipated after the surgery. (CX. 24, p. 1). After physical examination, Dr. Buckley was unable to explain Claimant's pain complaints. He felt that Claimant's treatment had been adequate and appropriate and did not believe that any further surgery or diagnostic evaluation was warranted. Dr. Buckley recommended that Claimant continue physical therapy and expressed the hope that Claimant's symptoms would resolve over time. (CX. 24, p. 2).

*Medical Records of John W. Cope, M.D. and Chris E. Wiggins, M.D.*

In January 1990, Dr. Wiggins saw Claimant for complaints of pain on the lateral side of his calf. (CX. 23, p. 5). In 1995, Dr. Wiggins and Dr. Cope treated Claimant for

an injury to his right elbow. (RX. 20, pp. 16-19). In 1997 and 1998, Dr. Cope treated Claimant for left knee pain. (RX. 20, pp. 4-15). During this time, Claimant underwent an arthroscopy on his left knee. (RX. 20, p. 9).

*Medical Records of Y.C. Joe Chen, M.D.*

On May 24, 1999, Dr. Chen, an anesthesiologist, saw Claimant for complaints of neck pain. Dr. Chen noted that he had previously seen Claimant on April 8, 1999, for complaints of lumbar pain. Claimant reported frequent sneezing which was causing him neck pain. Dr. Chen noted that Claimant had undergone neck surgery in December 1991 and that a 1998 MRI showed mild bulging to the right at the C5-6 disc. (CX. 21, p. 1). After a physical examination, Dr. Chen's assessment was cervical spondylosis and myofascial pain. (CX. 21, p. 2). Dr. Chen planned to refer Claimant to physical therapy for his myofascial pain. Despite Claimant's request for pain medication, Dr. Chen refused to prescribe Claimant any pain medication. (CX. 21, p. 3).

*Medical Records of Arthur D. Black, M.D.*

In November and December 1999, Dr. Black saw Claimant for swelling in his left hand following the November 12, 1999 left finger injury which is unrelated to the injury at issue in this case. He diagnosed Claimant with cellulitis and referred Claimant to Dr. Ekenna, an infectious disease specialist. (RX. 20, p. 3).

*Medical Records of Dr. Okechukwu, Ekenna, M.D.*

In November 1999, Dr. Ekenna consulted with Dr. Black regarding Claimant's left finger injury. (CX. 20, pp. 6-8). On December 10, 1999, Dr. Ekenna saw Claimant for a right hand injury on a referral from Dr. Black. Apparently Claimant's right hand had swollen as a result of IV infiltrations when he was being treated for his left hand injury in the hospital. At that time, Claimant's left hand had improved and the right hand was only mildly swollen. Claimant wished to return to work, and Dr. Ekenna agreed that Claimant could resume light duty work for Employer as of December 13, 1999. (CX. 20, p. 5). Claimant returned to see Dr. Ekenna on December 17 and 22, 1999, claiming that he was unable to return to light duty work on two attempts, first because of nausea from his pain medication and then because his hands continued to hurt. (CX. 20, pp. 1-3). Dr. Ekenna detected no further infection in either of Claimant's hands, so he suggested that Claimant treat with a specialist to determine the extent of his hand disability. (CX. 20, p. 1).

*Medical Records of Alexander Blevens, M.D.*

From January through March 2000, Dr. Blevens treated Claimant for his November 12, 1999 left finger injury. (RX. 19). After a March 23, 2000 FCE, Dr. Blevens determined that Claimant was able to function at a medium demand level. On March 31, 2000, he placed Claimant at MMI with no residual impairment to the left hand.

Dr. Blevens recommended that Claimant return to full unrestricted work and discharged Claimant from his care. (RX. 19, p. 6).

### *Medical Records of Singing River Hospital*

On July 9, 2000, Claimant went to the emergency room at Singing River Hospital complaining of a flare-up in neck pain with pain radiating into his right arm. Claimant related a history of a herniated disc in his neck since 1991 but reported that he had not had any problems for the last several years until about a month ago. Claimant stated that he was unaware of having done anything to reinjure his neck. (CX. 19, p. 5). Claimant was seen by Dr. Martin Bydalek, who prescribed some medication and told him to follow up with Dr. McCloskey. (CX. 19, pp. 3-4).

### **Vocational Evidence**

#### *March 23, 2000 Functional Capacity Evaluation*

Physical therapist Karen Davis conducted this FCE at the behest of Dr. Blevens. (RX. 21). Claimant tested at the medium demand level. Claimant was able to perform activities requiring manual dexterity but had difficulty manipulating objects with his left hand. Ms. Davis recommended a limit on repeated use of left hand fine dexterity skills. In terms of lifting restrictions, Claimant was not to lift over fifty pounds from floor to waist or forty-five pounds from waist to eye level. He was not to bilaterally carry anything over fifty pounds or carry anything over twenty pounds with his left upper extremity. Claimant was limited to pushing thirty-two pounds and pulling forty-seven pounds. Claimant was able to sit, stand, do elevated work while standing, climb stairs, squat, walk, crawl, and rotate his trunk while sitting or standing all on a constant basis. He was able to do lowered work in standing, kneeling, sitting, squatting and ladder climbing all on a frequent basis. Claimant was able to do ladder climbing requiring him to maintain and support his body weight with his left upper extremity on an occasional basis. (RX. 21, p. 1).

Ms. Davis found that Claimant had participated fully in the FCE and did not exhibit any self-limiting behaviors. (RX. 21, p. 7).

#### *September 2, 2003 Initial Vocational Evaluation by Leon Tingle*

On August 14, 2003, Mr. Tingle met with Claimant to gather some background information in order to evaluate Claimant's employability and residual wage-earning ability. Claimant told Mr. Tingle that he did not feel physically capable of working full time because of his pain. (RX. 23, p. 1). After a review of Claimant's medical, personal, educational and employment histories, Mr. Tingle concluded that Claimant was currently temporarily totally disabled. (RX. 23, pp. 1-3). Based on the findings of the 2000 FCE,

Mr. Tingle believed that Claimant would be able to return to medium level work once he reached MMI. (RX. 23, pp. 3-4). He felt that there were numerous types of jobs available to Claimant at a medium duty level, including janitor, floor technician, security guard, gate guard, route delivery, shuttle bus driver, assembler and cashier. These jobs had an entry-level wage ranging from \$5.50 to \$7.00 per hour. (RX. 23, p. 4).

*September 11, 2003 Labor Market Survey by Leon Tingle*

In this survey, Mr. Tingle compiled a sampling of positions that were available in Claimant's geographical area from November 1999 to September 2003. (RX. 23, p. 5). In November 1999, available positions included a job as a gate or security guard with Swetman Security. These jobs were sedentary to light in nature and paid \$5.25 to \$6.00 per hour. A job as a shuttle bus driver at Presidents Casino was light to medium duty work and paid about \$7.00 per hour. A commercial driver's license was required. A job as a cashier at Coastal Energy was light duty work which required lifting up to twenty pounds. The wage level was \$5.35 per hour. Finally, a job as an auto parts clerk at Advance Auto Parts was light duty, requiring lifting up to twenty pounds with occasional stooping and crouching. This job paid \$5.50 per hour.

In 2000, Pinkerton Security Services was hiring security guards. This job, which paid approximately \$5.90 per hour, was light in nature and required occasional bending and stooping and frequent reaching and handling. (RX. 23, p. 6). A job as a cashier at Munro Petroleum paid \$5.50 per hour for a 39.5 hour week, with a pay raise after thirty days of employment. Some light cleaning was required but there were no stocking or heavy cleaning duties. The auto clerk job at Advance Auto Parts continued to be available at the same rate of pay. A job as a gift shop cashier at Imperial Palace Casino Resort paid \$6.25 to \$7.00 per hour and involved light duty work.

In 2001, Treasure Bay Casino was hiring for a shuttle bus driver. This position paid \$7.00 per hour, plus gratuities. (RX. 23, p. 7). ITS was seeking passenger screeners at a local airport for \$6.50 per hour, with raises after six and twelve months. (RX. 23, pp. 7-8). This job involved medium duty work, including lifting up to fifty pounds with occasional bending and stooping. Sedentary positions operating the X-ray equipment were also available. A job as a casino guard at Boomtown Casino, which paid \$7.30 per hour, involved light duty work and required occasional bending and stooping and frequent reaching and handling. A job as a merchandiser for Coca-Cola was medium level duty with some lifting up to fifty pounds. Starting wages ranged from \$7.25 to \$8.00 per hour. (RX. 23, p. 8).

In 2002, the Mississippi Employment Security Commission had a job opening as a meter reader. This job was light/medium duty in nature and required lifting up to thirty-five pounds on occasion. The hourly wage rate was \$9.26. The City of Biloxi was accepting applications for dispatchers. This job was sedentary in nature and applicants

had to pass a minimum typing and number test. The city also had positions available for communication call takers. This job was less demanding in nature and paid \$9.31 per hour. Beau Rivage Casino was hiring for a shuttle bus driver position. (RX. 23, p. 8). This light/medium duty job paid \$7.50 per hour. (RX. 23, pp. 8-9).

Also in 2002, Coast Transit Authority was hiring for drivers. These positions involved light/medium duty work and paid a starting wage of \$7.00 to \$8.00 per hour. VSR Lock was hiring for assemblers. These jobs were sedentary bench work and paid \$6.00 per hour. The company was willing to work around anyone's physical restrictions. John Ward Excavation Services was hiring for dump truck drivers. This job required a commercial driver's licenses and was light/medium duty in nature, with an \$8.00 to \$10.00 hourly wage. A job as a security guard/janitor at Hirschbach Motor Lines was sedentary to light in nature with a \$300 weekly wage and a \$200 weekend wage. A job on a sales route for S & D Coffee was light/medium duty, possibly requiring some machine repair work. The lifting requirements ranged from twenty to thirty pounds and the job paid around \$20,000+ a year. (RX. 23, p. 9).

As of September 11, 2003, Copa Casino had an opening for a shuttle bus driver. A commercial driver's license was required for this light/medium duty job, which paid \$7.50 per hour. A job as a custodial worker at Keesler Air Force Base was medium duty and paid \$7.38 per hour. A job as a production machine operator at PFG Optics was medium duty and required lifting up to forty pounds. It paid \$9.00 per hour. Grand Casino was hiring for a box office ticket agent. This sedentary level job paid \$6.50 per hour. A job as a counter clerk/delivery person with a dry cleaners was available through Win Job Center. This light duty position paid \$6.00 per hour. The City of Gulfport was accepting applications for dispatcher recruits with the police department. (RX. 23, p. 10). This sedentary level job paid \$8.72 per hour. (RX. 23, p. 11). A job as a dump truck driver for Holden Earth Moving and Construction was light/medium duty and required lifting no more than thirty pounds. This job paid about \$8.00 per hour. Finally, a job as a soldering assembler for Bay Technical Associations involved sedentary bench work and required the ability to use precision hand and power tools. The wage rate was \$6.00 per hour. (RX. 23, p. 11).

## **Video Surveillance Evidence**

On May 8, 2000, Claimant was observed doing some work with his father outside his house. From 9:51 a.m. until 10:13 a.m., Claimant was observing bending and tilting his neck to look at something, bending at the waist several times while cutting installation and squatting several times while installing the installation. Claimant did not appear to have any difficulties in doing any of these activities or in walking around the yard. From 11:25 a.m. until 11:30 a.m., Claimant was again observed doing these same activities. At one point, Claimant looked up at the roof of the house with his neck tilted backward for

several seconds. At 11:32 a.m., Claimant sat down to rest. He continued to sit for the remainder of the video surveillance. (RX. 25).

#### IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the “true-doubt” rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

#### Credibility

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Newman, 460 F.2d 1241, 1243 (5th Cir. 1972).

The evidence in this case suggests that Claimant is a less than credible witness, particularly with regard to his complaints of neck pain since November 1999. While Claimant testified, both at the hearing and in a sworn affidavit, that his neck problems from the 1991 workplace accident had generally subsided in the time between 1996 and his subsequent workplace accident in November 1999, the medical evidence in this case clearly indicates that Claimant's subjective complaints of neck pain have been ongoing ever since 1991 and continue up to the present time. Based on my observations at trial, and because Claimant's own version of his medical history as to the neck pain is contradicted by the objective medical records in this case, I find him to be a less than credible witness. I will therefore accord more weight to the medical evidence in this case than to Claimant's own testimony when deciding upon the issues.

## Causation

Section 20(a) of the Act, 33 U.S.C. § 920(a), provides a claimant with a presumption that his injury was causally related to his employment if he establishes that he suffered a physical injury or harm and that working conditions existed or a work accident occurred which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989).

The first prong of Claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. § 902 (2).

An accidental injury occurs when something unexpectedly goes wrong within the human frame. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley; Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954).

The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). In relating the injury to the employment, however, the claimant must show the existence of working conditions which could have conceivably caused the harm alleged. See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982).

It is undisputed that Claimant sustained a workplace injury to his face on November 10, 1999. Claimant alleges that he later developed neck pain as a result of this injury. Dr. Bazzone has testified that Claimant suffers from cervical spondylosis and has recommended surgery for this condition. Based on the fact that Claimant did suffer some sort of injury on the day in question, combined with the diagnosis of a medical condition involving Claimant's neck, I therefore find that Claimant has established the first prong of prima facie case that his neck pain is causally related to his employment.

The second prong of Claimant's prima facie case requires him to show the occurrence of an accident or the existence of working conditions which could have

caused, aggravated or accelerated the condition. The 20(a) presumption does not assist Claimant in establishing the existence of a work-related accident. Mock v. Newport News Shipbldg. & Dry Dock Co., 14 BRBS 275 (1981). Therefore, like any other element of his case to which a presumption does not apply, Claimant has the burden of establishing the existence of such an accident by a preponderance of the evidence.

The Court must weigh all the record evidence, whether it supports or contradicts Claimant's testimony, in order to determine whether Claimant has met his burden in establishing the existence of a workplace accident.

In this case, Claimant testified that his current neck condition manifested itself after he struck his face on a hanger and cut the left side of his face while working for Employer on November 10, 1999. Mr. Parker testified that he has known of other shipyard workers who have sustained neck injuries after striking their heads on hangers. Dr. McCloskey testified that the type of accident described by Claimant is a plausible means of causing a neck injury, particularly in someone with a pre-existing neck condition. As I have already noted, Claimant's testimony on this subject is less than credible, but because Mr. Parker and Dr. McCloskey agree that it is possible that Claimant could have hurt his neck after having sustained the type of accident he describes, I find that Claimant has established the second prong of his prima facie case for causation and is entitled to the § 20(a) presumption as to his neck injury.

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the claimant's prima facie case with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of, or severing the connection between, such harm and the employment or the working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); James, 22 BRBS at 274.

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Employer has relied primarily upon medical evidence to rebut Claimant's prima facie case for causation. Three different doctors provided deposition testimony tending to support Employer's argument that Claimant's neck complaints are not causally related to his November 1999 workplace injury. First, Dr. McCloskey, who treated Claimant for his 1991 neck injury, as well as for his alleged November 1999 neck injury, testified that he continued to treat Claimant for his neck pain from 1991 through 1999. According to Dr. McCloskey, Claimant's neck pain had been ongoing from the time of the 1991 injury. Dr. McCloskey noted that he treated Claimant mostly for subjective complaints of pain during this time. As to the injury in question, Dr. McCloskey could not correlate Claimant's injury and his complaint based on the history given by Claimant. In his

opinion, there was nothing solid to connect Claimant's complaints of neck pain in August 2000 to a November 1999 injury. Dr. McCloskey noted that the May 2000 video surveillance tape showed "a different man than I saw in the office." Because he lacked objective medical evidence with which to corroborate Claimant's subjective version of events, Dr. McCloskey was unable to determine whether Claimant's November 1999 accident produced a permanent or merely a temporary aggravation.

In addition, Dr. Bensen, who has treated Claimant for chronic low back pain since 2001, testified that while Claimant has complained of back pain throughout his course of treatment, Claimant only mentioned his neck pain to Dr. Bensen on a few occasions. Dr. Bensen's testimony indicates that Claimant's primary problem is his back. Because Dr. Bensen did not treat Claimant's neck injury, he deferred to Dr. McCloskey's opinion as to the causation of the neck pain, and as previously noted, Dr. McCloskey believes that there is insufficient objective evidence to form a causal link between the November 1999 injury and Claimant's subsequent complaints of neck pain in the summer of 2000.

Finally, Dr. Bazzone, who obtained Claimant's medical records after he conducted an EME of Claimant, noted that although Claimant claimed to be symptom-free from 1996 until 1999, the medical records did not support this claim. Indeed, not only did Dr. McCloskey treat Claimant for his complaints of neck pain during this time, but the medical records also indicate that Claimant sought treatment for neck pain from at least one other doctor during 1999. Dr. Chen saw Claimant in April and May 1999 for complaints of neck pain and diagnosed Claimant with cervical spondylosis. An MRI taken at that time indicated bulging to the right at the C5-6 disc. Dr. Bazzone opined that Claimant had already suffered from cervical spondylosis for several years before the November 1999 injury and did not believe that the blow to Claimant's face accelerated his pre-existing condition. Moreover, when Dr. Bazzone examined Claimant, he noted no objective findings.

Based on these doctors' testimony, I find that Employer has provided sufficient evidence to rebut the § 20 (a) presumption, and I must now evaluate the record as a whole to determine whether Claimant's neck problems are causally related to his employment.

In this case, the weighing of the evidence is centered upon the juxtaposition of Claimant's subjective account of the history of his neck injury against the objective evidence, which generally fails to provide corroboration for Claimant's version of events. According to the objective evidence in this case, several months passed between the time Claimant's injury occurred and the time that he began to complain of neck pain. Claimant never reported any neck pain to Employer after the accident occurred, even though he has since claimed that his neck felt sore for a few days after the accident and that he had some flare ups in neck pain in January and March 2000. There is no evidence to indicate that Claimant injured his neck in November 1999, other than Claimant's own

testimony. Likewise, there is no objective evidence to indicate that Claimant suffered no other incidents involving his neck in the intervening time between the November 1999 accident and the first time that he sought treatment for neck pain in July 2000. The record indicates that Claimant has a history of various injuries of all types and also has had a history of neck pain since at least 1991. The record also indicates that since the 1991 injury, Claimant has engaged in certain activities, such as long-distance bike riding, which could aggravate or exacerbate a pre-existing neck condition. The record further indicates that Claimant has continued to seek medical treatment for neck pain ever since the 1991 injury. Dr. McCloskey stated the 1998 MRI and the September 2000 MRI of Claimant's cervical spine had shown essentially the same findings. Dr. Bazzone testified that the disc bulge at C5-6 is a result of osteophytic bridging and that bike riding involves extension of the neck, which in turn forms osteophytes in the neck. And as noted previously, the disc bulge was noted in the 1998 MRI taken before the workplace incident.

Finally, no doctor has causally related Claimant's current neck condition to his November 1999 workplace injury. Dr. Bensen deferred to Dr. McCloskey, who was only able to concede that Claimant's neck condition *might* be casually related to his employment provided that Claimant's subjective version of events was accurate. Dr. Bazzone unequivocally stated that Claimant's current problems are the result of a progression of an underlying condition and that the November 1999 accident did not accelerate Claimant's pre-existing condition.

In sum, there is little to no evidence in the record to support Claimant's contention that his current neck problems are causally related to his November 1999 workplace accident. Because Claimant's credibility is somewhat suspect, it is not even clear that Claimant actually hurt his neck on that day. Even if Claimant can be believed on this point, Dr. McCloskey suggested, and Dr. Bazzone believes, that at most, Claimant only sustained a temporary aggravation. Because I accord Claimant's testimony little weight as opposed to the overwhelming medical evidence which contradicts his history of the neck injury, I find that Claimant has failed to establish that his neck condition is casually related to his employment. Consequently, Claimant is not entitled to benefits or medical expenses from Employer under the Act.

## **Conclusion**

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

## **ORDER**

Claimant's claim for benefits under the Act is hereby **DENIED**.

**So ORDERED** this 10<sup>th</sup> day of December, 2003, at Metairie, Louisiana.

**A**

**LARRY W. PRICE**  
**Administrative Law Judge**

**LWP:bbd**